

October 17, 2016

**Via ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

RE: **Written Ex-Parte Presentation** – *Business Data Services in an Internet Protocol Environment*, et al., WC Docket Nos. 16-143, 15-247, and 05-25, and RM-10593

Dear Secretary Dortch:

Birch Communications, Inc. (“Birch”), respectfully submits this written *ex-parte* presentation in response to Chairman Wheeler’s Proposal to Promote Fairness, Competition, and Investment in the Business Data Services Market (“Fact Sheet”), issued by the Federal Communications Commission (“Commission” or “FCC”) on October 7, 2016 in the above-referenced proceeding. Birch previously has participated in this proceeding as part of the Wholesale Voice Coalition.<sup>1</sup>

Birch and its subsidiaries offer intrastate, interstate, and international telecommunications, data, Voice over Internet Protocol (“VoIP”), Internet access, cloud, and resold wireless services throughout the United States. Birch serves small, mid-sized, enterprise, and wholesale business and residential customers. Its primary market focus is on small-to-medium business (“SMB”) customers often with four or fewer lines at any single location. These customers typically are located in geographic locations where facilities-based competition with the incumbent local exchange carrier (“ILEC”) is not economically feasible. In order to serve SMB customers, Birch purchases a mix of DS1, DS3, and Ethernet services from the ILEC pursuant to commercial agreements. Many of these agreements contain “take-or-pay” commitments, “all-or-nothing” requirements, and excessive penalties for failure to meet the required capacity commitments.

Birch strongly supports the Commission’s efforts to promote competition, fairness, and investment in the business data services (“BDS”) market. As the Fact Sheet recognizes, access to BDS at fair and reasonable rates is essential to encouraging competition and ensuring competitors like Birch continue to have access to the underlying services they need to serve the SMB market.

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<sup>1</sup> See, e.g., WC Docket No. 16-143, *et al.*, Comments of Access Point Inc., Birch Communications Inc., Matrix Telecom, Inc., Manhattan Telecommunications Corporation d/b/a Metropolitan Telecommunications, New Horizon Communications Corp., and Xchange Telecom, LLC – The Wholesale Voice Line Coalition (dated June 28, 2016).





The lack of competitive alternatives and the evidence of ILEC market power support the Fact Sheet's proposal for continued regulatory oversight and reduced pricing for low-capacity, TDM-based services.<sup>2</sup> Birch also endorses the Fact Sheet's recommendation for additional controls and limitations on volume requirements and associated penalties for BDS, which will promote fairness and competition in the BDS market.<sup>3</sup> End users, Birch, and other competitors will benefit from these changes.<sup>4</sup>

Through numerous strategic acquisitions, Birch has created a market presence in less competitive areas of the country and continues to grow. It is critical that any transition to the reliance on competitive market forces for just and reasonable pricing for these essential underlying wholesale ILEC services does not thwart the nascent competition emerging. In many of these markets, not only must Birch secure the underlying facilities from ILECs, but those providers are its primary competitors. The Fact Sheet appears to recognize this tension by concluding wholesale BDS rates will be deemed presumptively unreasonable if they exceed retail BDS rates for like services. Birch urges the Commission to adopt regulatory restraints that recognize that for a period of time in many markets the ILECs will remain formidable competitors and will continue to have the ability to undercut competitors and undermine competitive penetration in the market.<sup>5</sup> The Commission must ensure competitors have the tools necessary to compete and at the same time obtain the underlying wholesale services they need to serve end user customers.

<sup>2</sup> See, e.g., WC Docket No. 16-143, Ex-Parte Notice filed by Level 3 Communications, LLC (dated Sept. 29, 2016) ("We explained that, because there is virtually no actual competition in the provision of business data services, the Commission should analyze the market by assessing the likelihood that a reasonably efficient competitor can deploy a connection to a customer location. As the record demonstrates, there is little prospect that competitors can deploy connections at or below 100 Mbps ("low-bandwidth services"). Accordingly, the Commission should treat low bandwidth services as non-competitive in all locations.").

<sup>3</sup> See, e.g., WC Docket No. 16-143, Ex-Parte Notice filed by Zayo Group Holdings, Inc. (dated Oct. 4, 2016) (listing issues with percentage commitments, tying arrangements, and unreasonable term commitments and stating: "Incumbent carriers should be prohibited from using the following anti-competitive contractual terms and conditions in all markets, as Zayo has experienced and seen how these terms make markets less competitive and block new entrants. Prohibiting these practices will enable Zayo and other competitive service providers to enter into markets, generally by building into those markets, and provide innovative, competitive service offerings to customers.").

<sup>4</sup> See, e.g., WC Docket No. 16-143, Ex-Parte Notice filed by Level 3 Communications, LLC (dated Sept. 29, 2016) ("We also emphasized that the Commission should ensure that business data services reforms, including ex ante rate regulation and protections against harmful lock-up provisions, take effect as soon as possible so that business customers and consumers experience the benefits of increased competition and reduced barriers to the technology transition.").

<sup>5</sup> See, e.g., WC Docket No. 16-143, Ex-Parte Letter from Midwest Association of Competitive Communications, CALTEL, Michigan Internet & Telecommunications Alliance, Northwest Telecommunications Association, and CompSouth (dated Sept. 13, 2016) ("Such a framework of ex ante price regulation should apply only to a single provider in any market. Today, there is no question that, where such regulation is appropriate, it should apply to the price cap incumbent LEC, which has a ubiquitous network in its territory and benefits from, among other things, economies of scale and scope in the provision of BDS that other providers do not.").





Pursuant to Section 1.1206(b) of the FCC's rules, a copy of this notice is being filed in the appropriate docket. Please contact me if you have any questions regarding this matter.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Anthony A. Tomae".

Anthony A. Tomae  
President and Chief Executive Officer  
Birch Communications, Inc.

